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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 799

ROBERT JOSEPH MARSHALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Statute and constitutional provisions involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	9

Opinion of the United States Court of Appeals for the Ninth Circuit.....Appendix A

TABLE OF AUTHORITIES CITED

CASES

	Page
Chapman v. United States, 365 U.S. 607, 81 S.Ct. 776, 5 L.Ed.2d 828	6, 8
Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955)	7
Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819	6, 8
Sartain v. United States, 303 F.2d 859 (9th Cir. 1962)	7
Stoner v. State of California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856	6, 8
United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951)	7
United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962)	7
United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59	6, 8

STATUTES

Title 18, U.S.C., Sec. 2113(c)	2, 3
18, U.S.C., Sec. 3231	2
Title 28, U.S.C., Sec. 1254(1)	2
28, U.S.C., Sec. 1291	2
28, U.S.C., Sec. 1294	2

CONSTITUTIONAL PROVISION

U.S. Constitution, Amendment IV	2

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on November 3, 1965.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 3, 1965. The United States Court for the District of Nevada had jurisdiction by virtue of Title 18, United States Code, Section 2113(c) and Title 18, United States Code, Section 3231. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Can property seized without a warrant be used as evidence against its owner in a criminal proceeding when the property was seized from the owner's landlady who, without the owner's authority, consented to the search of the owner-tenant's personal property?

Statute and Constitutional Provisions Involved

U. S. Const. Amend. IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, U.S.C., § 2113(c)

"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

Statement

The petitioner was charged by indictment for possession of stolen American Express Company of New York Travelers Checks of the value of $6,700.00, a violation of 18, U.S.C., § 2113(c). The petitioner was tried for the offense by a jury in the United States District Court for the District of Nevada, and was found guilty as charged.

The First Federal Savings and Loan Association, located in Phoenix, Arizona, was burglarized sometime during the night of October 8, 1963. American Express Company of New York Travelers Checks in the value of $6,810.00 were stolen during the burglary.

The petitioner, on October 11, 1963, had resided alone in the same apartment, located in Las Vegas, Nevada, for one year. The apartment was one of many in an apartment complex. The petitioner always paid his rent to the apartment manager, Mrs. Rosalina Caldwell.

Special agents from the Federal Bureau of Investigation after advising Mrs. Caldwell, placed petitioner's apartment under surveillance at approximately 5:00 o'clock p.m. on October 11, 1963. During the surveillance, on the late morning of October 12, 1963, the petitioner was observed leaving his apartment, carrying a brown leather type brief case. The petitioner walked to Mrs. Caldwell's apartment and entered the apartment still carrying his brief case.

The petitioner asked Mrs. Caldwell's permission to place the brief case in Mrs. Caldwell's closet; which permission was given. The petitioner placed the brief case in Mrs. Caldwell's dining room closet and specifically instructed her to hold the brief case and not to give it to anyone else. The petitioner on at least three prior occasions and on possibly six occasions had, with Mrs. Caldwell's permission left his brief case in her dining room closet for safe keeping and always with the same instructions—not to give it to anyone else. No other tenant utilized Mrs. Caldwell's apartment for safe keeping; however, the other tenants did use the Caldwell apartment when they paid their apartment rent.

After placing the brief case in the said closet, the petitioner engaged in a casual conversation with Mrs. Caldwell, then walked back to his own apartment. Minutes after the petitioner left the Caldwell apartment, Mrs. Caldwell, in complete disregard of the petitioner's instructions, telephoned the Las Vegas office of the Federal Bureau of Investigation. She telephonically related to a

special agent what had transpired. The special agent instructed Mrs. Caldwell to open the brief case. Following telephonic instructions, Mrs. Caldwell attempted to open the brief case and found it (she believed) to be locked. She related this fact to the special agent, and was instructed to continue to open the brief case. On the second attempt, Mrs. Caldwell opened the brief case, looked inside, and noticed what appeared to be packaged travelers checks. Mrs. Caldwell related her discovery to the special agent and was told by the agent to hold onto the brief case.

Two days later, on October 14, 1963, special agents from the Federal Bureau of Investigation went to Mrs. Caldwell's apartment and after identifying themselves, asked to look at the petitioner's brown brief case, which was still reposing in Mrs. Caldwell's closet. The agents did not have a search warrant. The special agents informed Mrs. Caldwell that a search warrant for the brief case could be obtained and she replied that a search warrant wouldn't be necessary.

Mrs. Caldwell produced the brief case from her dining room closet and voluntarily delivered the brief case to the special agents. The agents opened the unlocked brief case, inspected the contents, found some personal items and American Express Company Travelers Checks in the value of $6,700.00, and determined from a written list that the travelers checks had been stolen from the First Federal Savings and Loan Association in Phoenix, Arizona, on October 8, 1963. The special agents took the

travelers checks, the brief case and its contents into their custody.

The trial court denied petitioner's pre-trial motion to suppress the travelers checks as evidence and admitted the checks into evidence during the trial.

Reasons for Granting the Writ

1. This court, in at least four decisions has refused to sanction and validate a search resting on the consent of a third party. In *Lustig v. United States,* 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819, the manager of a hotel allowed police officers to search the room of a tenant, without a warrant, and in the tenant's absence. Similarly, in *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59, an assistant hotel manager gave police officers a key to a room, which they searched and, in which they found narcotics. The owner of the narcotics did not occupy the room, but had used the room for storage. This court held in *Chapman v. United States,* 365 U.S. 607, 81 S.Ct. 776, 5 L.Ed.2d 828, that a landlord could not validly consent to the search of a tenant's rented premises. This court more recently, in *Stoner v. State of California,* 376 U. S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856, reaffirming its prior holdings in *Lustig* and *Jeffers,* supra, again held that a hotel employee had no authority to consent to police officer's search of a guest's room.

A third party landlord's consent to search a tenant's room having been proscribed by this court, it would appear the same proscription should apply to the instant

case. The area in Mrs. Caldwell's apartment used by the petitioner for the safekeeping of his brief case, was the office area of the apartment and was no different from the lobby area of a hotel. Since Mrs. Caldwell could not validly consent to a search of petitioner's apartment, could she validly consent to a search of petitioner's brief case left in her care as petitioner's landlord?

The administration of criminal justice begs that this question be settled.

2. The majority opinion of the court below upholds the validity of the search and seizure of petitioner's brief case on the premise that petitioner, having delivered possession and control of his brief case to his landlord, consented to all consequences attendant upon surrender of possession. The majority opinion held that the search and seizure was not unconstitutional on the authority of *Sartain v. United States,* 303 F.2d 859 (9th Cir. 1962). The decision of the court below is believed to be erroneous and conflicting, in principle, with *United States v. Blok,* 188 F.2d 1019 (D.C. Cir. 1951); *United States v. Eldridge,* 302 F.2d 463 (4th Cir. 1962); and *Holzhey v. United States,* 223 F.2d 823 (5th Cir. 1955).

In each of these cases, the individual in charge of the property ultimately seized did not initiate contact with the law officer from which the search ensued as did Mrs. Caldwell in the instant case, and her act became the act of the law officers. Limiting instructions were not given by the property owner in the cited cases when possession changed, as given by the petitioner to Mrs. Caldwell.

It is further believed that the instant decision conflicts in principle with *Lustig, Jeffers, Chapman and Stoner,* supra.

3. The decision of the court below pivots on the petitioner's acceptance of risk and foreseeability of the consequences of his delivering the brief case to Mrs. Caldwell. If the act of landlord Caldwell was foreseeable, and the petitioner could not rely on a trust relationship established by landlord-tenant, then the constitutional protections afforded a tenant are diluted and meaningless.

The dissenting opinion of Circuit Judge Merrill (appendix A, infra), properly implements the holdings of this court and correctly decides the question presented—the landlady had no standing to consent to a search of petitioner's brief case.

4. The special agents waited two days before going to Mrs. Caldwell's apartment without a search warrant, to search the brief case and seize it together with its contents. No reason is offered for not obtaining a search warrant. The proposition was urged before the lower court that, on the facts known at the time of searching the brief case, the government agents had no probable cause for a search warrant. This proposition is again urged before this court. It is difficult to imagine a case where a search warrant should be required if not in this case. *Chapman v. United States,* supra.

The basis of our constitutional right that dictates against unlawful searches and seizures has been bypassed

by the majority opinion of the court below. It is believed the majority opinion is erroneous and the minority opinion correct.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND E. SUTTON
Counsel for Petitioner.

November 30, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT JOSEPH MARSHALL,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 20,041

[November 3, 1965]

Appeal from the United States District Court for the District of Nevada

Before: BARNES, BASTIAN and MERRILL, Circuit Judges.

BASTIAN, Circuit Judge.

Appellant stands convicted of violating 18 U.S.C. § 2113(c).[1] His primary claim here is that the stolen Traveler's Checks, which were the basis of his conviction, were unconstitutionally seized and should have been suppressed.

[1]18 U.S.C. § 2113(c) provides that: "Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan asociation, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker." Subsection (b) deals with and makes a crime the actual theft.

The essential facts are that three days after the October 8, 1963 theft of $6,810.00 worth of American Express Traveler's Checks from the First Federal Savings and Loan Association of Phoenix, Arizona, appellant, who resided in an apartment complex in Las Vegas, Nevada, was placed under surveillance by the Federal Bureau of Investigation. Appellant's landlady, Mrs. Caldwell, was advised of this surveillance. On October 12, 1963, appellant deposited an unlocked briefcase with Mrs. Caldwell and left it in her dining room closet, instructing her not to give it to anyone else. It appears that appellant had, on several previous occasions, used Mrs. Caldwell's apartment as a place of storage. Mrs. Caldwell promptly called the Federal Bureau of Investigation and during the ensuing telephone conversation she, at the request of an agent, opened the briefcase and informed the agent that it contained packaged Traveler's Checks. On October 14, two special agents went to Mrs. Caldwell's apartment and, after they verified that the aforementioned Traveler's Checks were the ones stolen from the Phoenix bank, she delivered the briefcase with its contents intact to the agents.

The validity of the search of the briefcase and the seizure of it and the stolen Traveler's Checks depends on the validity of the consent given by Mrs. Caldwell. At the outset it should be noted that this is not a case where a landlord has attempted to consent to a search of and seizure from premises rented to the appellant, as was the case in *Chapman v. United States,* 365 U.S. 610 (1961), nor is it a case of shared tenancy where one occupant

attempts to consent to a search of the entire premises to the ultimate detriment of the other occupant. In the latter case, the courts are not unanimous and the cases usually turn on particularized facts. Compare *Burge v. United States,* 342 F.2d 408 (9th Cir. 1965) with *Holzhey v. United States,* 223 F.2d 823 (5th Cir. 1955).

Our case is a simpler one in which the appellant voluntarily delivered possession and control of his briefcase to his landlady for safekeeping only to find that she, obeying the dictates of her conscience rather than his instructions, turned the briefcase over to the Federal Bureau of Investigation. Under these circumstances, we find nothing unreasonable in the actions of the agents and we hold that the search and seizure was not unconstitutional. *Sartain v. United States,* 303 F.2d 859 (9th Cir. 1962) cannot, as argued by appellant, be distinguished from the instant case on the ground that here the briefcase was given up to the authorities after they had initiated contact with the person who possessed it, whereas in *Sartain* there had been no such contact. There is nothing in this record to support the suggested inference that Mrs. Caldwell was in any way coerced by the Federal Bureau of Investigation. Rather, we think it clear that she was merely acting as any responsible citizen should in her position. After all, Mrs. Caldwell had no reason to become involved in the crime by allowing her apartment and herself to be used as a hiding place for the stolen Traveler's Checks. Since she was aware that appellant was under investigation, she was certainly entitled to avoid compromising herself by contacting the agents when she did.

None of this, however, is meant to mean that a man's briefcase is never secure against unreasonable search and seizure, but when possession and control of his briefcase is given by a man to another person we think that man accepts the risk that the other person will consent to a search and seizure of it and, under the circumstances that exist in this case, such consent is valid. Essentially, this case would be no different if appellant had casually confessed his crime to Mrs. Caldwell and she had notified the agents and later testified against appellant at trial.

As to appellant's other specifications of error, we hold that Special Agent McVay's testimony regarding his October 4, 1963 conversation with appellant about stolen Traveler's Checks was properly admitted as tending to show intent, design, knowledge, and lack of innocent purpose. *Whaley v. United States,* 324 F.2d 356 (9th Cir. 1963), *cert. denied* 376 U.S. 911, *rehearing denied* 376 U.S. 966; *Bible v. United States,* 314 F.2d 106 (9th Cir. 1960).

Finally, appellant's motion for judgment of acquittal was properly denied. The presumption of guilty knowledge arising from possession of recently stolen property [*Rugendorf v. United States,* 376 U.S. 533 (1964)], was sufficient to allow denial of the motion when made.

AFFIRMED.

MERRILL, Circuit Judge (Dissenting):

I dissent. I find here no consent by appellant to search or seizure.

There was no express consent. There was no express authorization to Mrs. Caldwell to give consent. If either is to be found it must be by implication through appellant's having placed the brief case in Mrs. Caldwell's possession.

By doing so he may be said to have consented to the consequences of all risks attendant upon such a surrender of possession which were reasonably foreseeable. The majority opinion holds that since it was reasonable for Mrs. Caldwell to co-operate with the Federal authorities, such co-operation was to be expected and thus was foreseeable and, by implication, consented to.

I cannot accept the reasonableness of Mrs. Caldwell's actions as the proper test in this case. Her search was not self-motivated by curiosity. Her communication with the officers was not the result of personal suspicion, nor was their search and seizure undertaken in response to and in satisfaction of her suspicions. In all respects, she acted at the request of the officers, in response to their wishes and as their agent.[1] If it was not permissible for them to search or seize themselves, it was not permissible for them to have another person search for them and deliver up

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[1]On the day before appellant entrusted his brief case to Mrs. Caldwell, Government agents had informed her that appellant's apartment was under surveillance. Immediately after appellant deposited his brief case with Mrs. Caldwell she telephoned the Federal agents. She was directed to open the brief case. She reported that the brief case appeared to be locked. The agent told her to try to open the brief case again. Mrs. Caldwell obediently complied and this time was successful. She then reported the contents of the brief case to the agent.

for their seizure simply because that person had the power to do so through possession. I do not regard as a foreseeable and thus consented-to risk the fact that Federal officers may improperly persuade the possessor to do for them (and not for herself) what they have no authority to do for themselves.

I would distinguish this case from *Sartain v. U. S.*, 303 F.2d 859 (9th Cir. 1962). In that case, unlike the present case, the search and ultimate seizure was not accomplished under Government direction and control. The independent action by the possessor in *Sartain* was one of the grounds on which we there distinguished *Holzhey v. U. S.*, 223 F.2d 823 (5th Cir. 1955). I would reverse on the authority of *Holzhey*.